88-838

No. _____

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1988

REUBEN NIEVES, Appellant

vs.

MARINA GARDENS NO. 1, INC., Appellee

On Appeal From The Decision of The Court of Appeal of the State of California, First Appellate District, After Denial of Hearing by the Supreme Court of The State of California

CORRECTED JURISDICTIONAL STATEMENT AND APPENDIX OF EXHIBITS

M. DEAN SUTTON, ESQ.
Counsel for Appellant
FULTON LAW FIRM
1833 The Alameda
San Jose, CA 95126
(408) 275-0255

Rule 15.1(a)

QUESTIONS PRESENTED

1. Does a stock coop home owner under the National Housing Act own a fee simple interest, or merely a month-to-month tenancy which can be forfeited in a summary eviction (unlawful detainer) proceeding?

2. Where state statutes as interpreted deny a stock coop home owner Substantive and Procedural Due Process and Equal Protection in a summary eviction proceeding, can the eviction judgment be res judicata to a subsequent action by the home owner for money damages for his home equity LOST as a result of the loss of the property right of possession?

3. Where a state summary eviction procedure denies a stock coop home owner a fair and full trial on the merits in

which he is entitled to present cross-complaints and/or affirmative defenses, including the defense of the constitutionality of the summary proceeding, is said eviction judgment res judicata (issue preclusion), or collateral estoppel (claim preclusion) and a bar to a subsequent action for damages by the home owner for lost home equity?

4. Do these state statutes as interpreted unconstitutionally Take Without Just Compensation the fee simple real property rights, including possession, owned by a stock coop home owner under the guise that he is a mere month-to-month tenant?

5. By providing mortgage assistance for stock coop housing under the National Housing Act, did Congress preempt, modify, or limit common law real property rights to home ownership?

Rule 15.1(b)

PARTIES TO THE PROCEEDINGS BELOW

1. REUBEN NIEVES, a natural person, a single man, purchased a home, known as a "unit" in a stock cooperative housing project operated by Appellee for $38,000.00 cash. Appellant was the defendant in a Municipal Court action for unlawful detainer/eviction. The Municipal Court entered judgment for Appellee saying the stock coop owner was a mere month-to-month tenant. Faced with immiment physical eviction by the sheriff without any money for shelter, Appellant agreed to a settlement whereby he waived the right to appeal and received a partial payment of $34,000.00 for equity in the home. Subsequently, Appellant discovered that he entered the settlement agreement by reason of Appelle's fraud, duress, and undue

influence. Appellant filed an action for damages in California Superior Court which is appealed from herein. In the Superior Court action, Appellant is plaintiff, Cross-defendant and Appellant. The Superior Court dismissed the entire action, sua sponte, solely on the basis that the prior Municipal Court eviction judgment was res judicata. The California Court of Appeal reversed, but directed the Superior Court to dismiss all causes of action on issues resolved in the Municipal Court judgment. The California State Supreme Court denied review by order of August 10, 1988. (NOTE: On October 21, 1988, the Superior Court again dismissed the relevant causes of action due solely to the res judicata effect of the prior eviction judgment.)

2. Appellee, MARINA GARDENS NO.

1, INC., is a California corporation. Appellee was the plaintiff in the original Municipal Court action for unlawful detainer/eviction. Appellee was the Defendant, Cross-complainant and Respondent in this Superior Court action for damages by Appellant.

3. Karen Fernandez was the adult niece of Appellant who resided in the home at the time of the original Municipal Court unlawful detainer/ eviction action. She is not a party to the appealed action, and has had no part in this action or appeal.

4. There are no other parties who appear below or who are parties to the appeal.

Rule 15.1(c)
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Rule 15.1(c)
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Rule 15.1(d)

OPINIONS BELOW

Notice of Appeal, filed in the California Court of Appeal, First Appellate District, on October 14, 1988, is Exhibit 1, pg. 27.

Unreported Court of Appeal Opinion filed May 26, 1988, is Exhibit 2, page 32.

The California Supreme Court denied petition for review by unreported order, In Bank, filed August 10, 1988 without opinion.

Rule 15.1(e)

JURISDICTION

The jurisdiction of this court is invoked as an appeal of a final judgment or decree rendered by the highest court of a state in which the decision could be had by appeal, when the validity of a

state statute is drawn in question on the ground if its being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of its validity (28 U.S.C. §1257(2).)

The nature of the proceeding below is an action in Superior Court (the California court of general and equitable jurisdiction) for declaratory relief and damages. A copy of the Complaint is Exhibit 3. The Superior Court sua sponte and without trial dismissed the complaint on all issues, including federal and Constitutional issues, holding that a prior Municipal Court summary unlawful detainer/eviction judgment was res judicata and that said court of inferior and limited statutory jurisdiction could and did litigate and terminate the fee simple real property

interest of Appellant. However, the federal and constitutional issues were not and could not be litigated in Municipal Court, but should be decided in a subsequent case. (Gonzalez v. Gem Properties, Inc., 37 Cal.App.3d 1029, 112 Cal.Rptr. 884 (1974); Lindsey v. Normet, 405 U.S. 56, 92 S. Ct. 862, 31L. Ed. 2d 36 (1972).

On appeal, the Court of Appeal of the State of California confirmed, inter alia, that portions of Superior Court decision dismissing the suit for damages, holding, as res judicata, the summary proceeding. Appeal is brought from that confirmation of the Superior Court decision. Appellant has suffered forfeiture of his home equity by reason of judgment in a summary proceeding where all issues could not be litigated. The subsequent civil action for damages

was wrongfully dismissed. The State Action denied Due Process and Equal Protection and constituted a Taking Without Just Compensation.

Specifically, Appellant contends that he owned an interest in real property recognizable under both common law and federal law as an interest which could not summarily be terminated by an eviction proceeding in any court, and specifically not in a Municipal Court with subject matter jurisdiction limited to $15,000. Appellant was denied constitutional rights of Due Process and Equal Protection, and the state court procedure constituted a Taking Without Just compensation in violation of the United States Constitution; all pursuant to statutes which, as interpreted and applied, are repugnant to the Constitution and statutes of the United

States. Further, said action constitutes state action in violation of 42 U.S.C. section 1983 et seq.

The following cases sustain jurisdiction:

Harding v. Illinois 196 U.S. 78 (1904), which holds that rights under the Fourteenth Amendment allow appeal to this court from judicial, as well as executive or legislative actions by the state.

Lindsey v. Normet 405 U.S. 56 (1972), which holds that a state summary eviction procedure does not violate the Due Process or the Equal Protection Clauses if and only if the tenant being evicted is not foreclosed from instituting a separate and second suit against the landlord to litigate rights to damages and other relief. In Lindsey, a case from Oregon under an

unlawful detainer statute similar to the present California statute, the summary procedure for eviction did not allow cross-complaint or many legal or equitable defenses. This Court held it permissible to segregate an action for possession of property from other actions arising out of the same factual situations. In the subsequent action, the evicted party may assert valid legal or equitable defenses or counter claims. (405 U.S. at 67.) Lindsey cites two prior cases of this court, Grant Timber & Mfg. Co. v. Gray, 236 U.S. 133 (1915), and Bianchi v. Morales 262 U.S. 170 (1923), in which the Court considered Louisiana eviction and Puerto Rico mortgage laws which provided for a summary possession action to be followed by a subsequent action in which all legal and/or equitable defenses could be

presented. The constitutionality of the summary eviction was not an allowable defense in the Oregon summary eviction action (405 U.S. at 67, fn. 12). The only way the summary unlawful detainer action can be constitutional in California is if the summary action is not res judicata to a subsequent full and fair hearing in which all legal and equitable defenses can be raised.

A second action is authorized: ". . . The tenant is not foreclosed from instituting his own action against the landlord and litigating his right to damages or other relief in that action. [¶] 'Due process requires that there be an opportunity to present every available defense." (405 U.S. at 66.) Here, the superior court dismissed the second action due solely to prior inferior court possession judgment.

Like Lindsey, the summary eviction is constitutional only if the person evicted can, in a subsequent action for damages and other relief, litigate all relevant issues not allowed in the first summary proceeding. Here, the summary eviction judgment is the sole basis stated by the state courts to deny Appellant his day in court on the merits, including the constitutionality of the summary proceeding. Here, the summary procedure occurred in a court without subject matter jurisdiction (see below). This Court has probable jurisdiction to reverse the actions and decisions below, and to remand for trial on the issues.

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Rule 15.1(f)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process and Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and the Taking Clause of the Fifth Amendment as incorporated to the states, are violated by the California procedure herein.

California Code of Civil Procedure section 1161 defines the nature of unlawful detainer as limited only to a defendant "tenant of real property for a term less than life."

California Code of Civil Procedure section 86 defined the subject matter jurisdiction of Municipal Court as limited to $15,000.00 at the relevant time.

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Rule 15.1(g)

STATEMENT OF THE CASE

The Court of Appeal of the State of California erred when it confirmed the prior decision of the Superior Court in holding that the Municipal Court judgment was res judicata on all issues raised or possibly raised in the unlawful detainer action because: 1) Appellant owned at least fee simple absolute interest in the unit Appellant was not a mere month-to-month tenant; 2) The summary eviction proceeding could not terminate the legal and equitable right, title, and interest in real property in which the defendant had no right of crosscomplaint or full opportunity to present legal or equitable defenses, including the constitutionality of the summary proceeding; and 3) the Municipal Court

lacked subject matter jurisdiction to litigate and terminate rights in a home in which there was at least $38,000 in equity when California Code of Civil Procedure section 86 at the time provided the subject matter jurisdiction of the court was limited to $15,000. The judgment was therefore void. The Court of Appeal said that by not appealing a judgment void on its face, Appellant is bound by it. By the reasoning of the Court of Appeal, a state court of inferior limited jurisdiction could issue probate decrees, judgments of divorce or dissolution of marriage, equitable and extraordinary relief, felony criminal decisions, all despite the lack of subject matter jurisdiction of the court if the losing party failed to appeal. This court must remand for trial to

prevent the loss of Appellant's equity in his home in violation of the protections of the United States Constitution. A declaration of the nature of the interest owned by the owner of a stock coop, home is required to prevent unjust forfeiture of fundamental property rights throughout the nation.

Rule 15.1(h)

SUBSTANTIALITY OF FEDERAL QUESTIONS

The summary eviction procedure (unlawful detainer) California Code of Civil Procedure section 1161 provides:

> "A tenant of real property, for a term less than life, . . . is guilty of unlawful detainer . . ." [in various specific acts, such as failing to pay rent or failing to quit the premises after sufficient notice.] (Emphasis added.)

The operative words of the statute are: ". . . tenant of real property, for a term less than life. . . ." Only such a tenant may be subject to the summary proceeding in California for unlawful detainer. In our case, Appellant, owned under common law, an interest in excess of a term less than life. Under common law, Appellant owned a fee simple absolute subject to condition subsequent. Said interest could not be taken by an unlawful detainer summary proceeding without violation of the United States Constitution.

The Supreme Court will review state court judgment or the validity of state statutes only if they involve a "substantial federal question"--i.e., a purported violation of the Constitution, a federal statute or treaty. Here, the

federal questions are 1) the nature of the interest in the stock coop owned by Appellant, 2) the constitutionality of the summary proceeding to terminate and forfeit his interest, and 3) the right to bring a subsequent action for damages after the summary eviction proceeding. None were litigated in the underlying municipal court action. These issues were submitted to the state superior court and expressly were not ruled upon by the superior court due solely to the res judicata affect of the underlying summary municipal court eviction proceeding. The federal questions were properly and timely raised in the state's superior court action (seventh cause of action) and were necessarily reviewed and decided by the superior court to reach its judgment. The federal questions not only were not

litigated in the municipal court, but were not available to be litigated as defenses or cross-complaints in the Municipal Court due to the summary nature of the eviction procedure in California.

In Maresse v. Academy of Orthodontic Surgeons 470 U.S. 373, 105 S. Ct. 1327, 84 L. Ed. 2d 274 (1985), this court held that federal courts must follow the preclusion laws of the particular state in which the action arose to determine if the second action can relitigate, in a court of competent jurisdiction, issues determined in a court which lacked subject matter jurisdiction. Justice O'Connor noted that if jurisdictional competence of the first court was a prerequisite to res judicata, the second action could be maintained. California follows

jurisdictional competence as a prerequisite to res judicata. (Haas v. Lamia 229 CA 2d 654, 40 Cal.Rptr. 518 (1964), Grannis v. Superior Ct. 146 Cal.245 (1905).) Following the rationale in Maresse, this Appellant should have been allowed to litigate in Superior Court the issues which the municipal court was not competent to determine. This court can re-examine the evidence to see if it supports the judgment on the authority of Postal Telegraph Cable Company v. City of Newport, Kentucky, 247 U.S. 464 (1918). In Postal Telegraph, the U.S. Supreme Court reviewed a state court decision that a lawsuit was barred by res judicata by a decision in a prior suit. The case proceeded to judgment on the pleadings, and the court declared that every uncontradicted allegation of fact

by the unsuccessful party must be taken as true. The court, in considering the issue of res judicata, held: "Res judicata like other kinds of estoppel, ordinarily is a matter of state law, and as the decision of the state court in this case in effect rest upon that ground, this of itself would be sufficient to sustain the judgment against reversal in this court, except for two queries that must first be answered: (a) Is the question of state law, in this case, independent of the federal questions? and (b) Is the decision reached upon that point sufficiently well founded to furnish adequate support for the judgment? [cites] [¶] Waiving the doubt whether, under the particular facts of this case, the question of res judicata can be regarded as independent of the federal

questions that were raised, we are of the opinion that the decision reached upon it is so clearly ill founded that it cannot sustain the judgment; and this for the reason that it is inconsistent with another federal right of the defendant, fundamental in character. [¶] The doctrine of res judicata rests at bottom upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction. [cites] The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. [cites] And as a State may not, consistent with the fourteenth amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to

be heard [cites], so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein. [¶] It follows that in this case res judicata cannot be regarded as an adequate support for the judgment; and since, without that, we have not the materials necessary for a proper disposition of the federal questions that were raised, we express no opinion upon them." (247 U.S. at 475-476.) The court then reversed the judgment and remanded the case for further proceedings not inconsistent with the opinion.

Our case is analogous to the Postal Telegraph case in that a state court refused to address federal issues raised in the state court action on the basis

of a res judicata effect given to a prior judgment. The prior judgment in Postal Telegraph was not res judicata in that the same parties were not involved. Here, the prior judgment is not res judicata in that the court had no subject matter jurisdiction and did not and could not have addressed the federal issues raised in the subsequent action. For the prior action to be validly res judicata, the federal questions must have been addressed and decided against Appellant.

In this case, a novel state action is being used to deny Appellant his opportunity to be heard on the federal issues presented. The federal question was evaded by the state courts, thereby resulting in state action denying federal constitutional rights. State procedure cannot be used to evade a

decision of federal issues. Thus, a state may not prescribe a novel procedure and then claim that failure to comply therewith precludes review. (NAACP v. Alabama, 357 U.S. 449 (1958).) Here, Appellant was forced to litigate in a court without subject matter jurisdiction in which he could not raise the federal issues. This would have been constitutional if he could have brought a subsequent action not barred by res judicata. When he brought the second action, however, the state courts declared the prior void judgment to be res judicata.

The courts of the State of California in effect say that Appellant has no forum at all in which to ask the state courts to review and litigate the constitutionality of the procedures used to forfeit his loss of property rights.

Such cannot be the case. Somewhere in the California courts, Appellant has to have a full and fair opportunity to be heard and to present all defenses, cross-complaints and allegations of unconstitutionality of the state summary procedure. This court must reverse and remand so that Appellant is afforded minimum due process of law.

The additional substantial federal question is whether congress intended in the National Housing Act (12 U.S.C. section 1701 et. seq.) to modify common law real property law so as to permit this Appellant with $60,000.00 in equity in his home, to be treated as a mere month-to-month tenant. Counsel for Appellee argued to the California Court of Appeals that federal law "regulated" this interest and implied that Congress had somehow preempted real property law

so that the interest owned by Appellant could be terminated and forfeited in the summary eviction procedure.

California courts are confused on this issue (see: California Coastal Commission v. Quanta Investment Corp. 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (1980); Estate of Pitts 218 Cal.184 (1933); Cf. Sun Terrace Manor v. Municipal Court 33 Cal.App.3d 739, 108 Cal.Rptr. 307 (1973).) In California Coastal Commission v. Quanta, Justice Auerbach concludes that the stock coop interest is "quasi-real property," which is, of course, not possible at common law. Guidance from this court as to the effect, if any, of the federal National Housing Act on California real property law is necessary. The property interest of Appellant was more than a mere month-to-month tenancy by ownership of

stock and voting rights, because the interest was perpetual, and because it was inheritable. Even a month-to-month tenant has a "property" right protected by the Fourteenth Amendment and 42 U.S.C. 1983 (see Joy v. Daniels 479 F.2d 236 (1973)).

Due process requires compensation for government taking of private property, for public or private use. The clause presupposes no taking for private use. "If compensation for private property taken for public use is an essential element of due process of law as ordained by the fourteenth amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the state within the meaning of that amendment. . . . The mere form of a proceeding instituted

against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation." (Chicago, Burlington & C. R'D v. Chicago, 166 U.S. 226, at 235, 236 (1896); see Pruneyard Shopping Center v. Robbins, 447 U.S. 74 (1979).) Due process also requires compensation for the taking of private property for private use (Cole v. La Grange 113 U.S. 1 (1884).) Here, a state court final judgment, void on its face, is acting to deny essential property rights from Appellant.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that probable jurisdiction should be noted.

Dated: 1/18/88

/S/

M. DEAN SUTTON, ESQ.
Counsel for Appellant
FULTON LAW FIRM
1833 The Alameda
San Jose, CA 95126
(408) 275-0255

DS6/ag

Rule 15.1(j)
APPENDIX OF EXHIBITS

1. Notice of Appeal, filed in the California Court of Appeal October 14, 1988, 5 pages 27

2. Opinion of California Court of Appeal, First District, filed May 26, 1988, 37 pages 32

3. Complaint (without exhibits) filed in California Superior Court, San Mateo County, filed May 29, 1985, 48 pages 66

M. DEAN SUTTON, ESQ.
FULTON LAW FIRM
Attorneys at Law
1833 The Alameda
San Jose, CA 95126
Telephone (408) 275-0255

[Filed in California Court of Appeal October 14, 1988]

Attorneys for Appellant NIEVES

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

REUBEN NIEVES,	CALIFORNIA SUPREME COURT
Plaintiff, Cross-Defendant, and Appellant,	CIVIL S006302
vs.	CALIFORNIA COURT OF APPEAL CIVIL A037227
MARINA GARDENS, NO. 1, INC.,	SAN MATEO COUNTY SUPERIOR COURT NO. 296960
Defendant, Cross-Complainant, and Respondent.	NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that REUBEN NIEVES, Plaintiff, Cross-Defendant and Appellant, hereby appeals to the Supreme Court of the United States from the final decision of this court filed May 26, 1988. Petition for Review was denied by the California Supreme Court on August 10, 1988.

This appeal is taken pursuant to Title 28 of the United States Code section 1257(2) when the decision is in favor of a state statute as interpreted when its validity is questioned on the ground of its being repugnant to the constitution, treaties or laws of the United States.

Appeal is from the final decision of the California Court of Appeal in a case in which hearing was denied by the California Supreme Court. (Douglas v. California (1963) 372 US 353, 354 fn 1,

83 S Ct. 814, 9 L Ed. 2d 811.) The last date to file Notice of Appeal is 90 days from the date the Court of Appeal's decision is final after Review is denied by the California Supreme Court, or on or before November 8, 1988 (28 USC §2101(c); see also US Sup. Ct. Rules, Rules 11.2, 12.2, 20.2).

This appeal is from the decision of this court only to the extent that this court failed to reverse the decision of the Superior Court below that the prior Municipal Court judgment was res judicata as to all issues of fact and law therein. Appellant appeals, among others, on the issues that California unlawful detainer, real property and eviction statutes, as interpreted in this case, deny protections of the 14th and 5th Amendments of the United States Constitution, and further result in

violation of Title 42, section 1983 et seq., of the United States Code to this Appellant. Specifically, the state statutes constitute a Taking Without Just Compensation of Appellant's home; denial of Due Process in that his home was forfeited without notice and opportunity to be heard in a full and fair plenary hearing in a court with subject matter jurisdiction with opportunity to present all defenses and crossclaims; and denial of Equal Protection in that a fundamental right, to wit: property, was taken and forfeited in a summary proceeding in a court of inferior jurisdiction, rather than in a court of equitable power and jurisdiction. Also, under color of law, California courts denied said basic rights to Appellant. Lastly, a false and erroneous interpretation of the

National Housing Act (12 USC §1701 et. seq.) resulted in the forfeiture of Appellant's stock coop home, on the mistaken belief the Congress has declared said home ownership mere month-to-month tenancy.

Dated: October 13, 1988

FULTON LAW FIRM

By: /s/
M. Dean Sutton,
Attorneys for
REUBEN NIEVES,
Plaintiff,
Cross-Defendant
and Appellant

DS6/ag

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

REUBEN NIEVES,

Plaintiff Cross-Defendant, and Appellant,

v.

MARINA GARDENS, NO. 1, INC.,

Defendant, Cross-Complainant, and Respondent.

_____/

A037227

(San Mateo County Super. Court No. 296960)

[Filed May 26, 1988]

[Not Reported]

I

Statement of the Case

This appeal is from an order of dismissal issued by the Superior Court on October 28, 1986 after the parties filed cross motions for summary adjudication of issues. We reverse the order of dismissal.

The present case is rooted in two

earlier actions, a 1983 Municipal Court unlawful detainer action (Marina Gardens, No. 1, Inc. v. Nieves, et al., No. 63383), and a 1983 Superior Court declaratory relief action (Nieves v. Marina Gardens No. 1, Inc., No. 276 369). In the present action, Appellant Reuben Nieves ("Nieves") seeks a declaration that his interest in an apartment in the Marina Gardens complex constitutes an interest that is not susceptible to an unlawful detainer action. He further seeks a declaration that his interest in the apartment was not terminated by the 1983 unlawful detainer action and thus that he is still the owner of the apartment. Nieves also raises a number of other related causes of action. We find that the 1983 unlawful detainer judgment is res judicata on the issue of the

municipal court's subject matter jurisdiction and of all other issues decided therein. As a result, all but one of Nieves' causes of action are barred by the doctrine of res judicata. Since one cause of action remains, the lower court could not dismiss the entire complaint. We therefore reverse the order of dismissal and remand the case for further proceedings.

II

Statement of the Facts

Marina Gardens is a 180-unit apartment complex located in San Mateo, California. The real property is owned, in fee simple, by respondent, Marina Gardens No. 1, Inc. ("Marina"). Marina is a stock cooperative corporation developed to provide moderate income housing under the National Housing Act (12 USC § 1701 et seq.) and Regulations

of the Federal Housing Administration, now the United States Department of Housing and Urban Development (HUD).

On April 10, 1980, Appellant Nieves purchased, from a third party, a share of common stock of Marina Gardens No. 1, Inc. Nieves paid $38,000 for the stock. On or about May 1, 1980, Marina issued Nieves a stock certificate for one share Class A Common Stock. Contemporaneously, Nieves and Marina entered into an Occupancy Agreement ("Agreement").

Pursuant to the terms of the Agreement, Nieves became entitled to occupy an apartment located at 1554 "A" Day AVenue, San Mateo. The Agreement provided for Nieves' payment of a monthly carrying charge. It further provided that Nieves could not assign the Agreement or sublet his dwelling

without the written consent of the Corporation.

On or about April 1, 1983, Nieves decided to allow his niece, Karen Fernandez, to occupy the apartment by herself, while he lived elsewhere. Nieves notified the Board of Directors of Marina and requested consent to the sublease. By letter of April 25, 1983, Marina indicated that it would consent to the sublease only upon the following conditions: 1) Marina would be in control of the rental of the unit and approval of the new tenant; 2) the rents would be collected by Marina; 3) Nieves would remain responsible for the payment of the rent; and 4) any rental profit under the sublease would be assigned to Marina. Nieves found the conditions, especially the last one, to be "too onerous and unfair" and proceeded,

without Marina's consent, to allow his niece into possession on or about May 1, 1983. In an undated letter, Nieves advised HUD that he had sublet his unit and enclosed a copy of the rental agreement he had effected with his niece.

On or about June 9, 1983, Marina gave Nieves a 30-day notice to terminate and forfeit his rights. Nieves' attorney at that time, Frederick L. Lyon, wrote Marina on June 29, 1983, advising that "[a]ny attempt at summary dispossession or ejectment of any tenant from Mr. Nieves' unit without an unlawful detainer action will be met with vigorous legal defense and maximum damage claims."

On July 12, 1983, Marina filed an unlawful detainer action in the San Mateo County Municipal Court to recover

possession of the apartment. Meanwhile, Nieves, on July 8, 1983, had filed a complaint for Declaratory Relief in the San Mateo County Superior Court. In that action, Nieves requested the superior court declare: 1) that Nieves' interest in the apartment constitutes an interest in real property; 2) that the use of an unlawful detainer action would result in an unlawful forfeiture of property owned by Nieves; and 3) that Nieves is entitled to possession and use of the apartment.

On July 28, 1983, Nieves filed a demurrer to the unlawful detainer action on the following grounds: 1) another action (his declaratory relief action) was pending in superior court; and 2) the municipal court did not have subject matter jurisdiction. Both parties submitted memoranda in which they

briefed these two issues. The municipal court overruled the demurrer.

On August 23, 1983, Nieves filed, in the superior court action, a motion to coordinate the superior and municipal court actions. In support of this motion, Nieves again asserted that the municipal court did not have subject matter jurisdiction. The motion for coordination was denied.

On October 17, 1983, the unlawful detainer action was tried in municipal court. Both parties presented extensive trial briefs, testimony and documentary evidence on the contested issues of the nature of Nieves' interest and the jurisdiction of the municipal court. On October 28, 1983, the municipal court entered a unlawful detainer judgment in favor of Marina. The court made extensive findings of fact and the

following conclusions of law:

"(a) A landlord/tenant relationship exists between plaintiff and defendant Nieves, which is subject to unlawful detainer and this Court has jurisdiction over this unlawful detainer action;

"(b) Plaintiff is the owner of the premises in fee simple;

"(c) Defendant Nieves does not have a life estate in the premises;

"(d) Defendant Nieves does not have an equitable interest in the premises;

"(e) The Occupancy Agreement dated May 1, 1980, is a lease;

"(f) The Rental Agreement dated June 1, 1980, is a sublease;

"(g) Defendant Nieves violated the covenants of his lease with plaintiff and was in breach thereof, by subletting the premises to defendant Fernandez without the consent of plaintiff, which

enabled plaintiff to terminate defendant's lease and maintain this action in unlawful detainer;

"(h) The termination of defendant Nieves' lease and the bringing and maintaining of this unlawful detainer action to recover possession of the premises was done by plaintiff, in good faith, solely on the ground set forth in plaintiff's Notice to Quit for Breach of Covenant;

"(i) Plaintiff is not precluded from terminating defendant Nieves' lease or bringing and maintaining this action in unlawful detainer because of any retaliatory eviction; and

"(j) Plaintiff is entitled to possession of the premises."

The judgment ordered that Marina recover possession of the apartment. It further declared the occupancy agreement

forfeited and awarded Marina rents and damages in the total amount of $1,224.12. Nieves did not appeal. The judgment became final.

Following the trial, on or about October 23, 1983, Nieves and Marina entered into a Mutual Release and Agreement ("Release"). Pursuant to the Release, Nieves filed for dismissal with prejudice of the superior court declaratory relief action. The superior court action was dismissed with prejudice on November 21, 1983. Additionally, the Release provided for Marina's purchase of Nieves' stock at the price of $34,069.05,[1]

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[1] Pursuant to the bylaws of Marina Gardens No. 1, Inc., Marina was required, following termination of the lease and recovery of possession, to either purchase Nieves' stock certificate at market value, or proceed to have it sold on the open market. Nieves was entitled to receive the sale proceeds less any amount owing to the Corporation under the lease and the bylaws. (By-Laws of Marina Gardens No. 1, Inc. art. III, § 6.)

and such purchase occurred on November 4, 1983. As part of the Release, Nieves released Marina from ". . . any and all claims, demands, actions, causes of action, liabilities, judgments, costs, damages, expenses and compensation of every kind and nature whatsoever, whether known or unknown, arising out of or in any way related to said Occupancy Agreement. . . ."

More than a year and a half after the unlawful detainer judgment became final, Nieves filed the present action, asserting the following causes of action: 1) declaratory relief; 2) quiet title; 3) violation of Unruh Act; 4) rescission of contract (mutual release and agreement); 5) cancellation of

dismissal of the superior court action; 6) violation of 42 United States Code section 1983; 7) injunctive relief; and 8) wrongful eviction.

All of these causes of action, except that for rescission of contract, arise out of the following allegations:

1) Nieves purchased all right, title, and interest in the apartment for $38,000;

2) Nieves' interest in the apartment is a fee simple absolute;

3) Marina wrongfully withheld consent of Nieves' proposed sublease; and

4) The municipal court wrongfully assumed subject matter jurisdiction and wrongfully terminated Nieves' tenancy by the unlawful detainer judgment.

The rescission cause of action is based on allegations of mistake of fact,

mistake of law, undue influence, lack of consent, actual fraud, and constructive fraud.

On June 19, 1986, Nieves moved for summary adjudication of issues. On July 23, 1986, Marina answered Nieves' motion and also moved for summary adjudication of issues. The court below reviewed the 1983 municipal court action and the superior court declaratory relief action. Following its review, the trial court entered the order of dismissal, sua sponte finding that:

"1. This Court [the trial court] has jurisdiction to review the jurisdiction of the Municipal Court in the unlawful detainer action No. 633383, and to order, sua sponte, the dismissal of the Complaint in the within action;

"2. Sun Terrace Manor v. Municipal Court (1973) 33 Cal. App. 3rd 739, is

controlling in the within matter, and the relationship between Plaintiff . . . REUBEN NIEVES and Defendant MARINA GARDENS NO. 1, INC., was that of landlord and tenant, subject to unlawful detainer;

"3. The Municipal Court of the County of San Mateo was a court of competent jurisdiction to hear and determine that certain unlawful detainer action (No. 63383) entitled 'MARINA GARDENS NO. 1, INC. vs. REUBEN NIEVES et al;' and

"4. The Unlawful Detainer Judgment, dated October 27, 1983, is a final Judgment, is not subject to collateral attack, is res judicata, and operates as an estoppel and conclusive adjudication between REUBEN NIEVES and MARINA GARDENS NO. 1, INC., as to all issues of fact and law set forth as

findings of fact and conclusions of law in said Unlawful Detainer Judgment.

III

Discussion

Appellant Nieves raises two issues on appeal: 1) the municipal court did not have subject matter jurisdiction in the unlawful detainer action; and 2) he is not subject to an unlawful detainer action in any court, as his interest in the apartment constitutes an interest in real property greater than a tenancy for less than life--the interest required to come within the realm of an unlawful detainer action. (Code Civ. Proc., § 1161.) Both these arguments overlap and involve the same basic contentions which are outlined below.

Nieves argues that he has a real property interest in the apartment constituting a fee simple absolute worth

at least $38,000. At the least, he argues, he has an interest greater than a tenancy for less than life. Nieves thus contends that his relationship with Marina was not that of landlord and tenant. In support of according ownership status to his interest, Nieves cites to statutes which provide such status to stock cooperative interests.[2] Finally, Nieves argues that Marina's refusal to consent to his sublease was a violation of the prohibition against unreasonable restraints.

Respondent Marina replies that the present action is barred by the doctrine of res judicata in that the municipal

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[2] Nieves refers to Code of Civil Procedure section 704.710 regarding homestead exemptions, Revenue and Tax Code sections 60-61 regarding tax assessments, and Financial Code section 1236 regarding residential financing.

court judgment was a conclusive determination of the court's subject matter jurisdiction as well as of the other issues encompassed in Nieves' complaint. We agree and hold that the present action is barred to the extent that it raises claims and issues which were, or could have been, decided in the unlawful detainer action. In so holding we do not reach the merits of Nieves' claims. We thus do not consider, as did the lower court, the validity of the municipal court's determination of its subject matter jurisdiction. As will be discussed below, the lower court did not have to reach that issue.

The doctrine of res judicata "rests upon the sound policy of limiting litigation by preventing a party who has had one fair adversary hearing on an issue from again drawing it into

controversy and subjecting the other party to further expense in its reexamination." (In Re Crow (1971) 4 Cal.3d 613, 622-23.) As stated in Olwell v. Hopkins (1946) 28 Cal.2d 147, "[a] final judgment on the merits between parties who in law are the same operates as a bar to a subsequent action upon the same cause of action, settling not only every issue that was raised, but also every issue that might have been raised in the first action. [Citations.]" (Id. at p. 152.)

Nieves makes three arguments in opposition to the application of res judicata. He first argues that the municipal court judgment is void and non-binding precisely because the court lacked subject matter jurisdiction. However, res judicata also applies to the determination by a court of its own

subject matter jurisdiction. (Estate of Estrem (1940) 16 Cal.2d 563, 569; Craig v. Superior Court (1975) 45 Cal.App.3d 675, 680.) As stated by the Supreme Court in Estate of Estrem, "[t]he jurisdiction of the court to render a judgment or order often depends upon the preliminary determination of certain jurisdictional facts. When all parties affected are actually or constructively before it with an opportunity to assert their contentions and to appeal from an adverse ruling, the finding of such facts by the court may be reviewed only by an appeal or other timely and available direct attack. . . . In such situations the finding is as conclusive as any other finding of fact by the court in the original proceeding." (Id. at p. 570.) The municipal court's finding of jurisdiction can thus bar

Nieves' present claims.

Furthermore, the court of appeal in Peery v. Superior Court (1985) 174 Cal.App.3d 1085 addressed the issue of whether a default judgment regarding child custody remained open to collateral attack for lack of subject matter jurisdiction. The court refuted the father's contention that the judgment was open to attack by citing to Witkin. (2 Witkin, Cal. Procedure (3d ed. 1985) Jurisdiction, § 280, pp. 686-687.) The court stated: "In fact, in cases where, as here, the party who wants to attack the judgment had notice and the opportunity to be heard and either participated in the proceeding or consented to the judgment, the general rule is exactly the opposite: such party normally is bound by the judgment, and estopped from attacking it

collaterally, unless certain exceptional circumstances exist. [Citation.] The rule [Witkin] states, adopted by both the Restatement Second of Judgments section 12, and the Restatement Second of Conflict of Laws section 97, is that normal principles of res judicata apply to the determination of subject matter jurisdiction unless that policy is outweighed by the policy against allowing a court to act without jurisdiction. [Citation.] The exceptions most commonly invoked to permit collateral attack are where the exercise of jurisdiction constitutes a manifest abuse of authority; the judgment substantially infringes on the authority of another tribunal or governmental agency; the court lacks the capability to adequately determine its jurisdiction, and procedural fairness

requires that it be subject to collateral attack (Rest. 2d Judgments, § 12.) Another compilation of exceptions says the judgment may be collaterally attacked where the lack of jurisdiction is clear; the jurisdictional issue is one of law rather than fact; the court is of limited jurisdiction; the jurisdictional issue is not actually litigated; or there is a strong policy against acting beyond jurisdiction. (Rest. 2d Conflict of Law, § 97.)" (Peery v. Superior Court, supra, 174 Cal.App.3d at p. 1094.) We note that while both Witkin and the Peery Court state that section 97 of the Restatement Second of Conflict of Laws lists "exceptions" to be applied, in actuality the noted items are listed in the original source as factors to be considered in determining

whether a particular judgment should be immune from collateral attack. (Rest. 2d Conflict of Laws, § 97(d), p. 296.)

Upon consideration of the exceptions listed by the Restatement Second of Judgments, and the factors listed by the Restatement Second of Conflict of Laws, we still find that collateral attack of the unlawful detainer judgment is not justified.

In evaluating the first set of exceptions, we note that municipal courts are specifically empowered to decide unlawful detainer actions and thus the municipal court's handling of Nieves' case does not constitute a manifest abuse of authority. The unlawful detainer judgment does not substantially infringe on the authority of another tribunal or governmental agency. Municipal courts routinely make

determinations as to their own subject matter jurisdiction and thus do not lack the capability to adequately make those decisions. Procedural fairness does not demand the judgment be subject to collateral attack as Nieves could have appealed the unlawful detainer judgment.

The factors listed by the Restatement Second of Conflict of Laws are similarly of little help to Nieves. The municipal court's alleged lack of jurisdiction is not clear. Nor is there any indication of a strong policy against acting beyond jurisdiction. Furthermore, while the jurisdictional issue is one of both fact and law, and the municipal court is of limited jurisdiction, we note that the issue of the court's jurisdiction was extensively litigated in the municipal court action. We find that this consideration far

outweighs the others as it goes to the heart of the policy underlying the doctrine of res judicata.

Nieves' second argument against res judicata is that unlawful detainer judgments do not normally preclude subsequent actions regarding title because issues of title cannot be addressed in the summary proceedings. We agree that this is generally the rule. However, the full and fair adjudication in an unlawful detainer action of issues material to a determination of title stands as a conclusive determination of those issues. This is so even when the action takes place in a municipal court. (Vella v. Hudgins (1977) 20 Cal.3d 251, 257.)

In Vella, the Supreme Court addressed the question of whether an

action to set aside a trustee's deed was precluded by an alleged "prior adjudication of the fraud issue in an unlawful detainer action between the parties." (Vella v. Hudgins, supra, 20 Cal.3d at p. 253.) The unlawful detainer action had been conducted in municipal court. After reviewing the relevant case law, the Court stated: "The record herein fails to disclose that Vella had the fair adversary hearing contemplated by us in Crow. The municipal court, in Hudgins' unlawful detainer action, was empowered to examine the conduct of the trustee's sale (if its validity had been challenged), and properly could consider whatever equitable defenses Vella might have raised insofar as they pertained directly to the right of possession. The court had no jurisdiction, however,

to adjudicate title to property worth considerably more than its $5,000 jurisdictional limit (§ 86), [3] nor could its judgment on the issue of possession foreclose relitigation of matters material to a determination of title except to the extent that the summary proceeding afforded Vella a full and fair opportunity to litigate such matters."[4] (Id. at p. 257.)

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3 Now Code of Civil Procedure section 86, subdivision (4)(B).

4 We recognize that while in the present case the unlawful detainer action was brought pursuant to Code of Civil Procedure section 1161, in Vella the action was brought pursuant to section 1161(a). We further recognize that section 1161(a), unlike section 1161, provides for a narrow and sharply focused examination of title. (Vella v. Hudgins, supra, 20 Cal.3d at p. 255.) However, these considerations do not diminish the applicability of the reasoning in Vella to the present case as the Court's analysis was not limited to those actions under section 1161(a).

Unlike the Court in Vella, we have no difficulty finding that Nieves was afforded a full and fair opportunity to litigate the issues material to a determination of title. Nieves' claims to ownership in the present case are exactly the same arguments he proposed in the unlawful detainer action to deny the existence of a landlord-tenant relationship. In fact, Nieves went to great lengths in the unlawful detainer action to establish the existence of his equitable interest in the apartment. (See Nieves' Supplemental Trial Brief.) Nieves has had his day in court.

We note that Nieves also asserts that if issues of title needed to be litigated, the municipal court was not empowered to decide those issues since the amount in controversy exceed the court's monetary limit. This contention

is in essence a restatement of Nieves' previous claim that the municipal court judgment is void because of lack of jurisdiction. As discussed above, this contention is ineffective in refuting the res judicata effect of the prior judgment.

As a third argument, Nieves contends in his brief that res judicata is inappropriate since his complaint alleges undue influence, mistake and economic duress. He states that "[a] party may attack any judgment by showing that it was secured by the extrinsic fraud of the other party. [Citation.]" This argument, however, is without merit since the allegations of fraud, undue influence, duress, and mistake pertain to the procurement of the release and not to the unlawful detainer judgment. The noted allegations, therefore, do not

diminish the preclusive effect of the unlawful detainer judgment.

At oral argument, Nieves elaborated on this argument, stating that res judicata is improper because the Release required that Nieves relinquish his right to appeal the unlawful detainer judgment. He argues that since the present action alleges that Nieves was "coerced" into signing the Release and thus was improperly denied his right to appeal, the current action should not be barred by the prior judgment. This argument, however, is also without merit. Irrespective of the validity of the allegations of duress, fraud, undue influence and coercion, the time for appeal of the unlawful detainer judgment has lapsed and that judgment is final.

For the reasons stated above, we find that the unlawful detainer judgment

is res judicata or all issues and claims decided therein. Upon review of Nieves' complaint, we find that one cause of action, that for rescission of the Release,[5] is not barred by res judicata. The Release was entered into after the unlawful detainer trial and thus could not have been raised in that action. All other claims, however, are based on issues which have been conclusively determined against Nieves and are thus

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[5] We note that the equitable action of rescission has been abolished, and that the remedy is now a legal action for restitution after rescission. (4 Witkin, Cal. Procedure (3d ed. 1985) Pleading, § 490, pp. 524-525.)

barred.[6]

We note that in proceeding with the rescission cause of action, Nieves would be limited to the remedy of monetary damages resulting from the loss of the ability to appeal. He cannot relitigate the issues decided by the municipal court, just as he cannot invalidate that

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[6] Nieves' claim for Cancellation of Documents seeks the cancellation of the Release and of the Request for Dismissal of the superior court declaratory relief action. At first glance it appears that this should survive since the documents came into existence after the trial. However, this claim is specifically based on the allegation that "[t]hese documents are voidable at the election of [Nieves], in that the basis for the purported contractual Release and Dismissal is the purported Municipal Court judgment. The Municipal Court had no subject matter jurisdiction in a summary unlawful detainer proceeding to declare or to terminate the real property ownership interest of [Nieves] in the town house . . . ." (See Complaint, pp. 16-17.) This allegation is precluded by the prior judgment. As a result, the cancellation claim is also barred.

court's judgment.

Dismissal of the entire complaint would have been appropriate only if all the causes of action were barred. Since this is not the case, we must reverse the order of dismissal. We note, however, that under Code of Civil Procedure section 436, subdivision (b), the trial court has the power to strike those causes of action barred by res judicata on the ground that each cause of action does not state a cause of action. (Lodi v. Lodi (1985) 173 Cal.App.3d 628, 631.)

The order of dismissal is reversed and the case remanded to the trial court for further proceedings consistent with this opinion. Each party to bear its own costs.

/s/
Benson, J.

WE CONCUR:

/s/
Kline, P.J.

/s/
Rouse, J.

(Nieves v. Marina Gardens No. 1, Inc. A037227)

M. Dean Sutton, Esq.
FULTON LAW FIRM
Attorneys at Law
1833 The Alameda
San Jose, CA 95126
Telephone (408) 275-0255

Attorneys for Plaintiff

[Filed May 29, 1985]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN MATEO

REUBEN NIEVES, Plaintiff, vs. MARINA GARDENS NO. 1, INC., A California Corporation, and DOES 1 through 100, inclusive, Defendants.	CASE NO. COMPLAINT FOR 1. DECLARATORY RELIEF 2. QUIET TITLE 3. VIOLATION OF UNRUH ACT (DAMAGES AND INJUNCTION) 4. RESCISSION OF CONTRACT 5. CANCELLATION OF DISMISSAL AND RELEASE (CC §3412) 6. VIOLATION OF 42 USC §1983 7. INJUNCTIVE RELIEF 8. WRONGFUL EVICTION

Plaintiff REUBEN NIEVES alleges:

1. Plaintiff is informed and believes and thereon alleges that defendant MARINA GARDENS NO. 1, INC. ("MARINA"), is, and at all times relevant hereto was, a non-profit corporation maintaining its principal place of business in San Mateo County, California, and is and was at all times relevant hereto duly licensed under the laws of California.

2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1 through 100, inclusive, and therefore sues these defendants by fictitous names. Plaintiff will amend this complaint to state the true names and capacities of these defendants when they have been ascertained. Plaintiff is informed and believes and thereon alleges that at all

times relevant hereto, and in regard to the acts or omissions pleaded herein, each fictitously named defendant was acting or failing to act with the knowledge and consent, and within the scope of authority, of each other defendant.

3. Plaintiff is informed and believes and thereon alleges that at all times relevant hereto each defendant was an officer, partner, proprietor, agent, employee, servant, joint venturer, affiliate, or subsidiary of each other defendant, and committed the acts or omissions herein pleaded while acting or failing to act within the scope of that relationship.

4. Plaintiff is further informed and believes and thereon alleges that at all times relevant hereto, and at the time of all acts or omissions of MARINA

alleged herein, DOES 1 through 50, inclusive, and each of them, were members of the Board of Directors of MARINA, officers of MARINA, and/or controlling shareholders of MARINA, and as such were, and are, individually liable and responsible for the alleged acts and omissions of MARINA. Hereinafter unless otherwise indicated reference to "MARINA" includes DOES 1 through 50, inclusive, and each of them.

5. At all times relevant hereto plaintiff was and is a single man.

6. On or about April 10, 1980, plaintiff purchased from Barry M. Shea, a single man, all right, title, and interest in and to a cooperative town house in the Marina Gardens development, known commonly as 1554 "A" Day Avenue, San Mateo, San Mateo County, California ("the town house"). Plaintiff purchased

the town house for $38,000 as his own residence and immediately thereafter moved in and took up residence.

7. On or about May 1, 1980, plaintiff's ownership of the town house and his relationship with MARINA were memorialized and evidenced by execution of an "Occupancy Agreement", copy attached hereto as Exhibit "A" and incorporated by this reference; issuance to plaintiff of a Share of Stock in MARINA, copy attached hereto as Exhibit "B" and incorporated herein by this reference; and the Bylaws of MARINA, copy attached hereto as Exhibit "C" and incorporated herein by this reference.

8. On or about April 1, 1983, plaintiff decided to allow his niece, Karen Fernandez, who was then a single adult, to occupy the town house exclusively. Plaintiff first notified

and requested consent of the Board of Directors of MARINA, who denied consent to plaintiff unless terms and conditions were agreed to as set forth in their letter to plaintiff of April 25, 1983, a copy of which letter is attached hereto as Exhibit "D" and incorporated herein by this reference.

9. Plaintiff deemed this refusal to be an unreasonable restraint against alienation, arbitrary and capricious, in violation of law, and a breach of the implied in law covenant of good faith and fair dealing, in that the proposed occupant was a good faith reasonable tenant.

10. On or about May 1, 1983, plaintiff in fact allowed his niece, Karen Fernandez, to occupy the town house exclusively, and plaintiff thereafter resided elsewhere.

11. On or about June 9, 1983, MARINA caused to be served upon plaintiff and Karen Fernandez a "Notice To Quit For Breach of Covenant", a copy of which notice is attached hereto as Exhibit "E" and incorporated herein by this reference. On or about July 15, 1983, plaintiff moved back into the town house and resided there with his niece, Karen Fernandez.

12. MARINA then filed suit, "Marina Gardens No. 1, Inc., vs. Reuben Nieves, Karen Fernandez and Does 1 through 10", in the Municipal Court of California, County of San Mateo, Southern Judicial Distict, Redwood City Branch, Case No. 63383. Over objection of plaintiff here, and despite the fact the Municipal Court had no subject matter jurisdiction, trial was held in that court on or about October 17, 1983.

A copy of the purported "Unlawful Detainer Judgment" rendered is attached hereto as Exhibit "F" and incorporated herein by this reference.

13. Meanwhile plaintiff, through counsel, had filed on or about July 8, 1983, a "Complaint for Declaratory Relief" in the Superior Court of the State of California, County of San Mateo, Case No. 276369.

14. On or about October 23, 1983, as pleaded with more particularity below, plaintiff was unlawfully and improperly induced, forced, and required by MARINA to execute a "Mutual Release and Agreement", a copy of which document is attached hereto as Exhibit "G" and incorporated herein by this reference, and was also induced, forced and required by MARINA to cause to be dismissed the above described Superior

Court action for declaratory relief. A copy of the Request for Dismissal is attached hereto as Exhibit "H" and incorporated herein by this reference. Plaintiff submits for the reasons set forth below that the purported Release and purported Dismissal are each void and of no force and effect, and must be set aside by this court to allow trial on the merits.

15. Plaintiff was forced to move by MARINA, and did move, from the town house on or about November 10, 1983.

FIRST CAUSE OF ACTION:

DECLARATORY RELIEF

16. An actual controversy has arisen and now exists between plaintiff and MARINA concerning their respective rights and duties as to the town house.

17. Plaintiff contends:

a. Plaintiff stills owns all

right, title, and interest, legal and equitable, in and to the town house.

b. Plaintiff's interest in the town house is, and at all times herein relevant was, a freehold, and a fee simple absolute, in that the documents by which he took title (Exhibits "A", "B", and "C" hereto) set up an interest of possibly infinite duration. As such, said interest was and is a fee simple absolute. In the alternative, plaintiff submits that the interest is a fee simple subject to reasonable condition subsequent, or a life estate in plaintiff, but any event it is a freehold interest and not a mere month-to-month tenancy or a tenancy for less than life.

c. The Municipal Court had no subject matter jurisdiction to determine the issues in this matter, and the

issues pleaded herein are therefore not barred by principles of res judicata or collateral estoppel, in that the Municipal Court had no subject matter jurisdiction under Code of Civil Procedure section 1161. Plaintiff's interest in the town house was for a term at least equal to a life estate or greater, and in no event was plaintiff a tenant of real property for a term less than life. Therefore, the Municipal Court had no subject matter jurisdiction to decide any issue or enter any judgment determining plaintiff's rights to the town house based on the summary proceeding of unlawful detainer.

d. Plaintiff's interest in the town house cannot be terminated by the summary proceeding of unlawful detainer in any court, as the interest constituted a real property interest in

excess of a mere tenancy for less than life.

e. Plaintiff's interest in the town house authorized plaintiff to freely alienate, sell, give, transfer, encumber, or in any other way hypothecate the interest, in whole or in part, including, but not limited to, the right of possession.

f. Plaintiff lawfully can and could freely lease and/or assign any interest in the town house as long as prior consent of MARINA was requested, and the proposed tenant or assignee was a "good faith reasonable" tenant or assignee. MARINA had no authority and no power to deny consent to the proposed transfer of possession to Karen Fernandez, in that Karen Fernandez was a good faith reasonable tenant.

g. As is pleaded with more

particularity below, plaintiff was wrongly induced, forced, and required by MARINA to execute a Release and a Dismissal of his prior superior court action which would have determined plaintiff's rights on the merits, and plaintiff therefore contends the Release and the Dismissal are void. Plaintiff requests a trial on the merits to determine property rights of the parties in the town house.

h. As is pleaded with more particularity below, plaintiff contends that MARINA has violated the law as set forth in subsequent causes of action of this complaint.

18. MARINA contends:

a. Each of plaintiff's contentions is incorrect.

b. The interest of plaintiff was and is that of a mere month-to-month

tenant, which interest authorizes MARINA to act only as a landlord for a tenant.

c. The town house interest of plaintiff was and is something less than a tenancy for life, and therefore unlawful detainer was and is an appropriate procedure to declare the tenancy terminated and to evict plaintiff physically.

d. The Municipal Court had subject matter jurisdiction to declare plaintiff's interest terminated, and the Municipal Court action is res judicata of the controversies in this action.

e. MARINA, as landlord, had no duty to act reasonably under the implied in law covenant of good faith and fair dealing, and therefore had no duty to even consider the good faith reasonableness of a proposed occupant, tenant, and/or assignee of plaintiff,

and therefore could unreasonably deny and prevent plaintiff's proposed transfer of possession to his niece, Karen Fernandez.

f. MARINA could act unreasonably, abitrarily, and capriciously against all persons in a class, including plaintiff, the class being persons who own a town house interest identical or substantially identical to plaintiff's, in that MARINA could deny to these persons the right of reasonable and free alienation of their town house interest, including but not limited to, the transfer of possession only.

19. Plaintiff desires a judicial determination of his rights and duties, and findings and declaration that:

a. Plaintiff's interest in the town house is a fee simple absolute or, in the alternative, a fee simple

defeasible subject to condition subsequent, or in any event an interest in law and in equity in excess of a mere tenancy for less than life within the meaning of Code of Civil Procedure section 1161.

b. Plaintiff's interest was not determined or terminated by the purported unlawful detainer judgment in Municipal Court.

c. The purported Dismissal of plaintiffs' prior superior court action and the related purported Release are void for reasons pleaded below with more particularity and incorporated herein by this reference.

d. Plaintiff still owns the town house, with all right, title, and interest therein.

SECOND CAUSE OF ACTION: QUIET TITLE

20. Plaintiff refers to the

allegations of Paragraphs 1 through 15, inclusive, and the First Cause of Action, set forth above, and incorporates each herein by this reference.

21. Plaintiff is informed and believes and thereon alleges that DOES 51 through 75, inclusive, and each of them, are each individuals or entities other than MARINA who have or claim to have, or may have or may claim to have, some right, title, or interest in and to the town house.

22. Plaintiff is the sole owner of the town house.

23. The basis of plaintiff's title is the Occupancy Agreement, Share of Stock, and Bylaws of MARINA (Exhibits "A", "B", and "C" hereto), the combined effect of which documents is that plaintiff has owned and still owns an

interest in the real estate which is a fee simple absolute, or in the alternative, a fee simple subject to condition subsequent, or in the alternative, a life estate measured by the life of plaintiff. Plaintiff contends that his interest is a fee simple absolute in the town house, subject only to real estate taxes and the applicable recorded convenants, conditions, and restrictions of record.

24. MARINA contends that plaintiff's interest is only that of a month-to-month tenant, and that plaintiff is also a shareholder, separate and distinct, and that no real estate interest equivalent to a fee simple or a life estate exists.

25. Plaintiff seeks to quiet title against the claims, present or future, of MARINA and all other defendants by

judicial declaration that his interest is in fact a fee simple absolute, still owned by plaintiff.

THIRD CAUSE OF ACTION:

VIOLATION OF UNRUH ACT

(Civ. Code §51, et. seq.)

26. Plaintiff incorporates herein by this reference Paragraph 20 of the Second Cause of Action set forth above.

27. At all times herein mentioned, MARINA was and is a "business establishment" within the meaning of Civil Code section 51.5, dealing in the business of residential housing in the form of a stock cooperative town house business containing many town houses. MARINA offered these town houses to the general public, upon financial qualification conditions, and marketed these town houses to the general public.

28. By the eviction procedure

against plaintiff pleaded above, MARINA arbitrarily, capriciously, and without reasonable cause or business necessity discriminated against, boycotted, black-listed, refused to sell to, and refused to trade with plaintiff, and wrongfully and arbitrarily excluded plaintiff from possession of the town house.

29. This discrimination was expressly based solely upon an arbitrary and capricious reason, to wit, the fact that plaintiff decided to allow his niece, Karen Fernandez, an adult, to reside in the town house, and that plaintiff did not agree to the unreasonable demands of MARINA regarding such occupancy. Solely and proximately because of this act of plaintiff, MARINA boycotted plaintiff, and intentionally, knowingly, and willfully discriminated

against, black-listed, refused to reasonably and in good faith honor the legal rights of plaintiff, and refused to trade in any further manner whatsoever with plaintiff.

30. MARINA's discrimination against plaintiff on the sole ground that plaintiff decided to allow his niece, Karen Fernandez, an adult, exclusive possession of the town house was based solely on the ground that plaintiff was a member of and represented the group or class of owners who own town houses in the building who attempted to act in such a way as to carry out their legal rights. MARINA's discrimination was and is arbitrary and capricious, and therefore impermissible. Plaintiff's conduct in transferring possession of the town house was and is a legally and constitutionaly protected

and lawful act in violation of no enforceable contract or law, and was reasonable in all respects.

31. MARINA's conduct was and is a violation of the Unruh Civil Rights Act (Civ. Code §51, et. seq.), which Act prohibits arbitrary and capricious discrimination against an individual arising not only from class characteristics, but also from lawful individual conduct, including, but not limited to, the conduct of plaintiff herein.

32. Solely and proximately because of the denial of rights and the impermissible discrimination against plaintiff in violation of the Unruh Civil Rights Act as herein alleged, plaintiff has actually sustained, and MARINA is therefore liable for, damages, including but not limited to loss of the

use of the town house to plaintiff, in an amount in excess of $15,000 to be determined according to proof at trial, plus the statutory penalty of three times actual damages (but in no case less than $250.00), attorneys fees, and court costs, all as provided in Civil Code section 52(a).

33. The impermissible discrimination against plaintiff in violation of the Unruh Civil Rights Act alleged herein was done by MARINA intentionally, knowingly, oppressively, willfully, maliciously, with conscious disregard of the rights of plaintiff, and with conscious intent to cause injury, loss, and damage to plaintiff. Plaintiff is therefore entitled to further damages from MARINA sufficient to punish MARINA and by way of public example in an amount not less than

$1,000,000.

34. As a direct and proximate result of MARINA's deliberate and intentional denial of plaintiff's rights and its impermissible discrimination against plaintiff as herein alleged, plaintiff has suffered continual mental and emotional distress, upset, and anguish, as well as physical illness and distress, and has had to consult medical practioners for care and treatment of these conditions. Plaintiff has thus sustained further damages, both for general distress and for the specific costs and expenses of medical treatment, in total amounts to be determined according to proof at trial.

FOURTH CAUSE OF ACTION:

RESCISSION OF CONTRACT

(Civ. Code §1689, et. seq.)

35. Plaintiff incorporates herein

by this reference Paragraph 20 of the Second Cause of Action set forth above.

36. On or about October 23, 1983, in Redwood City, Santa Mateo County, California, plaintiff and MARINA entered into a written contract consisting of the purported release attached hereto as Exhibit "G", and the subsequent Request for Dismissal of the Superior Court action, attached hereto as Exhibit "H."

37. On or about October 23, 1983, MARINA, with intent to deceive plaintiff and to induce him to enter into these contract documents, obtained the signature of plaintiff by fraud, by mistake, and/or through duress, menace, or undue influence in the following particulars:

a. Undue influence: MARINA took unfair advantage of plaintiff's weakness of mind, in that plaintiff was

physically ill, mentally distressed, and mentally unable to understand the effect of the documents.

b. Undue influence: MARINA took grossly oppressive or unfair advantage of plaintiff's financial necessity and distress, in that plaintiff was physically ill and mentally distressed to the point of being unable to understand and consent to the substance, form, and effect of the documents.

c. Duress: MARINA unlawfully detained the property of plaintiff, in that MARINA threatened imminent physical eviction of plaintiff through unlawful writ and use of the sheriff, against which threatened act plaintiff had no immediate or speedy legal remedy. The duress further consisted of MARINA's imminent physical detention of the town house of plaintiff, without which town

house plaintiff had no place to live and no funds with which to obtain other shelter.

d. Mistake of law: Plaintiff and MARINA misapprehended the law, all supposing that they knew and understood it at that time, and all making the same mistake as to the law, in that apparently plaintiff and MARINA each thought that the Municipal Court had subject matter jurisdiction through an unlawful detainer summary proceeding to determine the rights and terminate the real property interest and rights of plaintiff.

e. Mistake of law: Plaintiff alone misapprehended the law, which misapprehension MARINA was aware of at the time of contracting, but did not rectify, in that plaintiff thought the Municipal Court had subject matter

jurisdiction to determine the rights of plaintiff in a summary unlawful detainer proceeding and to terminate the real property interest and rights of plaintiff.

f. Mistake of fact: Plaintiff suffered an unconscious ignorance material to the contract in that plaintiff thought as a fact that the Municipal Court had jurisdiction to declare and terminate his real property interest and rights in an unlawful detainer summary proceeding.

g. Lack of consent: Plaintiff's apparent consent was not free because of his medical and mental condition at that time, which condition rendered him unable to knowingly understand and appreciate the nature of the documents he was prevailed upon to sign.

h. Actual fraud:

1) MARINA stated as a fact that which was not true when MARINA did not believe its statement to be true, in that MARINA stated the Municipal Court had subject matter jurisdiction in a summary unlawful detainer proceeding to declare and terminate the real property ownership rights of plaintiff.

2) MARINA asserted in a manner not warranted by the information it had while making the assertion, that which was not true, although MARINA may have believed it to be true, to wit, that the Municipal Court had subject matter jurisdiction in a summary unlawful detainer action to declare and terminate the real property ownership rights of plaintiff.

3) MARINA suppressed from

plaintiff the fact that MARINA knew that the Municipal Court did not have subject matter jurisdiction in a summary unlawful detainer proceeding to declare and terminate the real property ownership rights of plaintiff.

4) MARINA, through an act fitted to deceive plaintiff, allowed plaintiff to believe that the Municipal Court had subject matter jurisdiction in a summary unlawful detainer proceeding to declare and terminate the real property ownership rights of plaintiff.

i) Constructive fraud:

1) MARINA breached the duty of good faith and fair dealing based in the fiduciary relationship of corporate board of directors to

shareholder, and/or of landlord to tenant, which is in the nature of a trustee, thereby gaining an advantage over plaintiff by misleading plaintiff to his prejudice, in purportedly declaring and terminating the rights of plaintiff in the Municipal Court summary unlawful detainer proceeding.

2) MARINA, by acting and failing to act as pleaded above, committed a breach of duty which the law declares to be fraudulent, without respect to actual fraud. Such acts and omissions constitute constructive fraud, in that they violate the implied in law covenant of good faith and fair dealing and fiduciary obligations from MARINA to plaintiff in the relationship

arising from this transaction. These relationships are in the nature of a trust, and MARINA's duty of fiduciary conduct was breached.

38. Plaintiff had no knowledge of the injury caused to him by MARINA until on or about January 18, 1985, at which time plaintiff first discussed the matter with current counsel and discovered the wrongful acts and omissions of MARINA pleaded herein.

39. Plaintiff intends service of summons and this complaint to serve as notice of rescission of the aforementioned contractual documents, Exhibits "G" and "H" hereto, and hereby offers to restore all consideration furnished under said contractual documents, on condition that MARINA restore to plaintiff the value of the

town house taken from him in an amount not less than $150,000, or the town house itself.

40. Plaintiff will suffer great and substantial harm if MARINA is allowed to keep the town house, and asks for clear title to it or damages equal to its value of not less than $150,000, with interest thereon at the highest legal rate available from the date of rescission (the date of filing of this complaint). Plaintiff has been denied and will continue to be denied a valuable real property right consisting of his residence and/or the other rights of possession, management, control, and enjoyment, including increasing value, if any, of the town house unless said documents are rescinded.

FIFTH CAUSE OF ACTION: CANCELLATION OF DOCUMENTS

41. Plaintiff incorporates herein by this reference Paragraph 20 of the Second Cause of Action set forth above.

42. There are in existence a certain Release, Exhibit "G" hereto, and a certain Request for Dismissal, Exhibit "H" hereto, which documents together allegedly constitute a contractual basis for termination of the rights of plaintiff in and to the town house. These documents are voidable at the election of plaintiff, in that the basis for the purported contractual Release and Dismissal is the purported Municipal Court judgment. The Municipal Court had no subject matter jurisdiction in a summary unlawful detainer proceeding to declare or terminate the real property ownership interest of plaintiff in the

town house, which is an interest in excess of a tenancy less than life within the meeting of Code of Civil Procedure section 1161. If the Release and/or Dismissal are left outstanding, plaintiff may be precluded from a judicial decision on the merits and a declaration of his rights in the town house.

43. Plaintiff requests a judgment ordering MARINA to surrender the original Release to this court and a judgment declaring that the Dismissal and the Release are each void and cancelled.

44. In addition to cancellation, plaintiff requests judgment from MARINA for damages in an amount in excess of $15,000 to be determined according to proof at trial.

45. The acts and omissions of

MARINA herein alleged were done intentionally, willfully, knowingly, maliciously, with conscious disregard of the rights of plaintiff, and with specific intent to cause injury, loss, and damage to plaintiff, and plaintiff therefore requests additional damages sufficient to punish MARINA and by way of public example in an amount not less than $1,000,000.

SIXTH CAUSE OF ACTION: VIOLATION OF 42 USC §1983

(Civil Rights Act of 1871)

46. Plaintiff incorporates herein by this reference Paragraph 20 of the Second Cause of Action set forth above.

47. On or about July 12, 1983, MARINA wrongfully and unlawfully filed suit and obtained the purported unlawful detainer judgment against plaintiff, Exhibit "F" hereto, in Municipal Court.

48. Plaintiff at all appropriate times protested and attempted to prevent the prosecution of the unlawful detainer action and/or the entry of the unlawful detainer judgment, but was unable to prevent the action or the judgment.

49. By reason of the conduct of MARINA alleged herein, plaintiff was threatened with imminent physical eviction by the Sheriff of San Mateo County, California, and was thereby deprived of rights, privileges, and immunities secured to him by the Constitution of the United States and laws thereunder; was denied due process of law in violation of the Constitution of the United States and laws thereunder; was denied equal protection of the laws in violation of the Constitution of the United States and laws thereunder; and was further deprived of property without

due process of law in violation of the Constitution of the United States and laws thereunder.

50. As a direct and proximate result of the deprivation of his rights by MARINA as herein alleged, plaintiff sustained physical injury, mental and emotional distress, suffering, humiliation, and indignity; was prevented from freely transacting his business; and lost property rights, all to his damage in an amount in excess of $15,000 to be shown according to proof at trial, and further incurred medical expenses in a total amount to be shown according to proof at trial.

51. As a further direct and proximate result of the acts of MARINA alleged herein, plaintiff suffered loss of his town house, which had a value at the time of loss of approximately

$150,000.

52. Plaintiff requests judgment against MARINA for damages according to proof, that MARINA be required to pay plaintiff's attorney fees pursuant to 42 USC section 1988, and for such other and further relief as the court may deem just.

53. MARINA did the things herein alleged with evil motive and intent, or with reckless or callous indifference to plaintiff's rights. Plaintiff therefore requests an award of exemplary and punitive damages against MARINA in an amount not less than $1,000,000.

SEVENTH CAUSE OF ACTION: INJUNCTION

54. Plaintiff incorporates herein by this reference Paragraph 20 of the Second Cause of Action set forth above.

55. There is no plain, adequate, or speedy remedy at law available to

plaintiff to obtain or protect his rights, and plaintiff therefore requests that this court issue preliminary injunction and permanent injunction ordering MARINA to return and convey to plaintiff all right, title, and interest in and to the town house.

56. Plaintiff additionally requests such other and further extraordinary, equitable, and injunctive relief as the court may deem just.

EIGHTH CAUSE OF ACTION:

WRONGFUL EVICTION

57. Plaintiff incorporates herein by this reference Paragraph 20 of the Second Cause of Action set forth above.

58. On or about June 9, 1983, MARINA wrongfully evicted plaintiff and interfered with plaintiff's right of possession of the town house by serving a notice on plaintiff that his rights in

the town house had been terminated, and by subsequently causing the Municipal Court unlawful detainer action and judgment to occur. All these acts were done by MARINA with malice and without probable cause to believe that plaintiff breached the lease agreement or had terminated or forfeited his real property rights in the town house. As a result thereof, plaintiff was forced to vacate the town house on about November 10, 1983. Plaintiff's ownership interest and/or lease relationship with MARINA as set forth in Exhibits "A", "B", and "C" hereto, included the implied covenant of quiet enjoyment of possession (Civ. Code §1927) which covenant MARINA breached.

59. As a direct and proximate result of MARINA's constructive eviction of plaintiff from the town house as

herein alleged, plaintiff has suffered general damages in an amount in excess of $15,000 to be determined according to proof at trial.

60. As a further direct and proximate result of MARINA's constructive eviction of plaintiff from the town house as herein alleged, plaintiff has incurred the following special damages: costs of medical treatment according to proof, actual attorneys fees according to proof, costs of substitute shelter, and other actual and special costs to be shown according to proof of trial.

61. The acts of MARINA herein alleged were willful, fraudulent, malicious, oppressive, intentional, knowing, and done with conscious disregard of the rights of plaintiff and with the intent to cause injury, loss,

and damage to plaintiff, and plaintiff therefore requests an additional judgment of damages sufficient to punish MARINA and by way of public example, in an amount not less than $1,000,000.

WHEREFORE, plaintiff requests judgment against defendant, and each of them, as follows:

On the First Cause of Action:

1. Judicial declaration of plaintiff's rights and duties as to defendants and the town house;

2. Findings and declaration that

a. Plaintiff's interest in the town house is a fee simple absolute or, in the alternative, a fee simple defeasible subject to condition subsequent, or in any event an interest in law and in equity in excess of a mere tenancy for less than life within the meaning of Code of Civil Procedure

section 1161.

b. Plaintiff's interest was not determined or terminated by the purported unlawful detainer judgment in Municipal Court.

c. The purported Dismissal of plaintiffs' prior superior court action and the related purported Release are void for reasons pleaded below with more particularity and incorporated herein by this reference.

d. Plaintiff still owns the town house, with all right, title, and interest therein.

On the Second Cause of Action:

3. Order of the court quieting title to the town house in plaintiff, finding that plaintiff's interest in the town house is a fee simple absolute, and denying all claims, present or future, of defendants, and each of them, in and

to the town house;

On the Third Cause of Action:

4. General damages for violation of the Unruh Act in an amount in excess of $15,000, to be determined according to proof at trial, plus the statutory penalty of three times actual damages;

5. Attorneys fees and court costs as provided in Civil Code section 52(a);

6. Punitive and exemplary damages in an amount not less than $1,000,000;

7. Medical and incidental expenses in total amounts to be shown according to proof at trial;

On the Fourth Cause of Action:

8. Rescission of the purported Release and the purported Request for Dismissal, Exhibits "G" and "H" thereto respectively;

9. Order that defendants restore to plaintiff either the town house or

the value thereof, in an amount not less than $150,000, with interest thereon at the highest legal rate;

10. Award to plaintiff of clear title to the town house, or alternatively, of damages equal to the value of the town house, in an amount not less than $150,000, with interest thereon at the highest legal rate;

On the Fifth Cause of Action:

11. Declaration that the purported Release and the purported Request for Dismissal, Exhibits "G" and "H" hereto respectively, are each void and cancelled;

12. Order to MARINA to surrender the original Release, Exhibit "G" hereto, to the court for cancellation;

13. General damages in an amount in excess of $15,000 to be determined according to proof at trial;

14. Punitive and exemplary damages in an amount not less than $1,000,000;

On the Sixth Cause of Action:

15. General damages in an amount in excess of $15,000 to be determined according to proof at trial;

16. Damages for loss of the town house in an amount of approximately $150,000;

17. Attorneys fees pursuant to 42 USC section 1988;

18. Punitive and exemplary damages in an amount not less than $1,000,000;

On the Seventh Cause of Action:

19. Preliminary injunction and permanent injunction ordering defendants, and each of them, to return and convey to plaintiff all right, title, and interest in and to the town house;

20. Such other and further

extraordinary, equitable, and injunctive relief as the court may deem just;

On the Eighth Cause of Action:

21. General damages in an amount in excess of $15,000 to be determined according to proof at trial;

22. Medical and incidental expenses in a total amount to be shown according to proof at trial;

23. Punitive and exemplary damages in an amount not less than $1,000,000;

On all Causes of Action:

24. Costs of suit herein;

25. Such further relief as the court deems proper.

Dated: May 29, 1985

FULTON LAW FIRM

By: /s/
M. Dean Sutton,
Attorneys for
Plaintiff

Pbg

PROOF OF SERVICE BY MAIL

I am employed in the County of Santa Clara, California;

I am over the age of 18 years and not a party to the within action; my business address is 1833 The Alameda, San Jose, California.

On November 18, 1988, I served CORRECTED JURISDICTIONAL STATEMENT AND APPENDIX OF EXHIBITS on the interested parties in said cause by placing, on that date at my place of business, a true copy thereof enclosed in a sealed envelope with the United States Postal Service, with first class postage prepaid addressed as follows:

1. One copy in an envelope addressed:

   Clerk, California Supreme Court
   State Building Room # 4250
   455 Golden Gate
   San Francisco, CA 94102

2. One copy in an envelope addressed:

   Clerk, Court of Appeal
   5154 State Building
   350 McAllister Street
   San Francisco, CA 94102

/ / /

3. One copy in an envelope addressed:

Clerk, Superior Court of San Mateo County
401 Marshall Street
Redwood City, CA 94063

4. Three copies in an envelope addressed:

Allen Berland, Esq.
601 California Street, Suite 206
San Francisco, CA 94108

5. One copy in an envelope addressed:

Hon. John Van de Kamp
California Attorney General
1515 "K" Street
Sacramento, CA 95814

I am a Member of the Bar of the United States Supreme Court. I declare under penalty of perjury that the foregoing is true and correct, and that

/ / /

/ / /

/ / /

this declaration was executed on November 18, 1988 at San Jose, California.

M. DEAN SUTTON /s/
Type or Print Name Signature

State of California)
County of Santa Clara) ss.

On this 18th day of November in the year one thousand nine hundred and eighty-eight, before me, SUSAN O. MORSE, a Notary Public, State of California, duly commissioned and sworn, personally appeared M. DEAN SUTTON, known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal

/ / /
/ / /

in the County of Santa Clara the day and year in this acknowledgment first above written.

SUSAN A. MORSE
NOTARY PUBLIC, State of California

Case No.: California Supreme Court Civil S006302; California Court of Appeal Civil A037227; San Mateo County Superior Court No. 296960

Case Name: Nieves vs. Marina Gardens, No. 1, Inc., et al.
Clerk, California Supreme Court
State Building Room # 4250
455 Golden Gate
San Francisco, CA 94102

Supreme Court, U.S.
FILED
DEC 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-838

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1988

REUBEN NIEVES, Appellant

vs.

MARINA GARDENS NO. 1, INC., Appellee

On Appeal From The Decision of The Court of Appeal of the State of California, First Appellate District, After Denial of Hearing by the Supreme Court of The State of California

MOTION OF APPELLEE TO DISMISS

ALLAN M. BERLAND
Attorney at Law
601 California Street
Suite 206
San Francisco, CA 94108
Telephone (415) 397-6711

Counsel for Appellee

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QUESTIONS PRESENTED FOR REVIEW

I. Does this Court have jurisdiction to determine federal questions which were not presented to, or decided by, the state court?

II. Does this Court have jurisdiction to review a decision of a state court based solely upon the res judicata effect of a final judgment in that state?

III. Do state common law principles of real property and res judicata raise a substantial federal question?

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No. 88-838

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1988

REUBEN NIEVES, Appellant

vs.

MARINA GARDENS NO. 1, INC., Appellee

On Appeal From The Decision of The Court of Appeal of the State of California, First Appellate District, After Denial of Hearing by the Supreme Court of The State of California

MOTION OF APPELLEE TO DISMISS

STATEMENT OF THE CASE

Appellant appeals from an unpublished decision of the California Court of Appeal, First Appellate District, which held that a prior final judgment between Appellant and Appellee is, under

California law, res judicata on the issue of the prior court's subject matter jurisdiction and all other issues decided therein, and remanded the case to the trial court for further proceedings consistent with the opinion.

Appellant seeks to invoke the jurisdiction of this Court under 28 U.S.C. section 1257 (2) on the grounds that the Court of Appeal decision is a final judgment or decree rendered by the highest court of the State of California, when the validity of a state statute is drawn into question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity. 12 U.S.C. section 1257 (2).

Appellee hereby moves to dismiss the appeal, and opposes the granting of a writ of certiorari, on the grounds that:

1. The federal question sought to be reviewed was not timely or properly raised, and was not expressly passed on by the California Court of Appeal;

2. The decision of the California Court of Appeal rests on an adequate non-federal basis; or

3. The appeal does not present a substantial federal question.

STATEMENT OF FACTS

Marina Gardens is an apartment complex consisting of 180 apartment units located in San Mateo, California. The real property is owned by Appellee, Marina Gardens No. 1, Inc. ("Marina Gardens"), a stock cooperative, non-profit corporation organized under the laws of the State of California.[1/]

1/ Marina Gardens No. 1, Inc. has no parent, subsidiary or affiliate company.

Appellant became a shareholder of Marina Gardens in 1980, having purchased the stock from a prior shareholder, and executed a lease with Marina Gardens for possession of an apartment located at 1554 "A" Day Avenue, San Mateo, California ("the apartment"), which lease provided that Appellant would not sublet the apartment without the consent of Marina Gardens.

In 1983, Appellant moved from Marina Gardens to a new residence in Redwood City, California, and sublet the apartment without the permission of Marina Gardens in violation of the lease. Marina Gardens filed an unlawful detainer action in the San Mateo Municipal Court pursuant to the California unlawful detainer statute (California Code of Civil Procedure section 1161) to recover possession of the apartment.

By demurrer and answer to the unlawful detainer complaint, by motion in a concurrent declaratory relief action filed by Appellant against Marina Gardens in the San Mateo Superior Court, and in the trial of the unlawful detainer action, Appellant raised the same claims that the Municipal Court did not have subject matter jurisdiction in the unlawful detainer action on the grounds that a landlord/tenant relationship did not exist, that Appellant's interest in the apartment was in excess of a term less than life, and, therefore, his interest was not subject to unlawful detainer. These claims were rejected, and an unlawful detainer judgment was ultimately issued by the San Mateo Municipal Court following the unlawful detainer trial. Appellant did not file an appeal of the judgment, and it became

final. No writ of possession was issued by the Court.

Since the unlawful detainer judgment terminated the lease, but not Appellant's ownership of his stock, following the trial, Marina Gardens and Appellant entered into a "Mutual Release and Agreement" ("the Agreement") on November 8, 1983, whereby Marina Gardens purchased Appellant's stock for $34,069.05, and Appellant released Marina Gardens from all claims arising out of the lease and the matters set forth in the Superior Court and Municipal Court actions, filed a dismissal with prejudice of the Superior Court action, and agreed not to file any action or make any claim for any injury or damage arising therefrom. Appellant's former attorney, who represented him in both actions, expressly acknowledged that the Agreement was executed by Appellant under his direction and advice.

In reliance on the Agreement, Marina Gardens issued stock to a new shareholder, who occupied the apartment pursuant to a new lease with Marina Gardens.

A new action was filed by Appellant, with a new attorney, in the San Mateo Superior Court in 1985, more than 1 1/2 years after the final termination of the prior two actions.

This third action, out of which Appellant's appeal to this Court arises, is for declaratory relief, quiet title, rescission, damages and related causes of action, which seeks a declaration that Appellant's interest in the apartment was in excess of a term less than life and not subject to an unlawful detainer action, that the San Mateo Municipal Court wrongfully assumed subject matter jurisdiction and wrongfully terminated Appellant's interest in the apartment, and

that he is, therefore, still the owner of the apartment, and seeks to rescind the Agreement on the grounds of an alleged mistake of fact and mistake of law that the San Mateo Municipal Court had jurisdiction of the unlawful detainer action, lack of consent and undue influence, actual and constructure fraud of Marina Gardens in misrepresenting to Appellant that the Municipal Court had jurisdiction in the unlawful detainer action.

Following motions for summary adjudication of Marina Gardens and Appellant, the trial court in the within action reviewed the pleadings, briefs, declarations and documents filed in this action, the 1983 Municipal Court unlawful detainer action, and 1983 Superior Court declaratory relief action, and, on October 22, 1986, entered an Order of Dismissal,

sua sponte, finding that the trial court herein had jurisdiction to review the jurisdiction of the Municipal Court in the 1983 unlawful detainer action, and to order, sua sponte, the dismissal of the complaint in the within action; that Sun Terrace Manor v. Municipal Court (1973) 33 Cal. App. 3d 739, is controlling in the within matter, and that the relationship between Appellant and Marina Gardens was that of landlord and tenant, subject to unlawful detainer; and that the San Mateo Municipal Court was a court of competent jurisdiction to hear and determine the 1983 unlawful detainer action. The trial court also found that the 1983 unlawful detainer judgment is a final judgment and is not subject to collateral attack, is res judicata, and operates as an estoppel and conclusive adjudication between Appellant and Marina Gardens as

to all issues of fact and law set forth in the findings of fact and conclusions of law in said unlawful detainer judgment.

Appellant appealed from this Order to the California Court of Appeal, raising two issues on appeal: 1. The San Mateo Municipal Court did not have subject matter jurisdiction in the unlawful detainer action; and 2. Appellant is not subject to an unlawful detainer action in any court, as his interest in the apartment constitutes an interest in real property in excess of a term for less than life - the interest required to come within the realm of an unlawful detainer action (California Code of Civil Procedure, section 1161). See Court of Appeal Opinion at p. 47 (set forth as Exhibit 2 of the Appendix of Appellant's Corrected Jurisdictional Statement, at pps. 32 -

65), which also contains a detailed statement of the facts and issues litigated by the parties in the 1983 Municipal Court and Superior Court actions.

The California Court of Appeal held, in its Opinion filed on May 26, 1988, under California law, "...the 1983 unlawful detainer judgment was res judicata on the issue of the municipal court's subject matter jurisdiction and of all other issues decided therein." (Opinion, pps. 33 and 34), and that:

> "...the present action is barred by the doctrine of res judicata to the extent that it raises claims and issues which were, or could have been, decided in the unlawful detainer action. In so holding we do not reach the merits of Nieves claims. We thus do not consider, as did the lower court, the validity of the municipal court's determination of its subject matter jurisdiction. As will be discussed below, the lower court did not have to reach that issue." Opinion, p. 49.

The Court of Appeal also did not consider the validity of Appellant's cause of action for rescission of the Agreement or for damages, but noted that since the Agreement was entered into after the unlawful detainer trial, this claim was not barred by res judicata, but Appellant's remedy would be limited to the recovery of monetary damages resulting from the loss of the ability to appeal. Id. at pps. 63 - 64. Since this cause of action was not barred by res judicata, the Court of Appeal reversed the Order of Dismissal, stating that under California law the trial court had the power to strike those causes of action which were barred by res judicata. The Court of Appeal remanded the case to the trial court for further proceedings consistent with the opinion. Id. at p. 65.

On June 10, 1988, Appellant petitioned the Court of Appeal for a rehearing, which was denied on June 23, 1988. On July 5, 1988, Appellant petitioned the Supreme Court of the State of California for review, which was denied on August 10, 1988. On October 14, 1988, Appellant filed in the Court of Appeal a Notice of Appeal to the Supreme Court of the United States.

On November 10, 1988, following Marina Garden's motion to strike and to dismiss, the trial court filed an order striking and dismissing seven causes of action of Appellant's complaint on the basis they were barred by res judicata.

SUMMARY OF ARGUMENT

Appellant seeks to invoke the jurisdiction of this Court under 28 U.S.C. section 1257 (2) on the grounds that the California Court of Appeal decision is a final judgment or decree rendered by the highest court of the State of California, when the validity of a state statute is drawn into question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity. 12 U.S.C. section 1257 (2).

Appellee moves to dismiss the appeal, and opposes the granting of a writ of certiorari, on the grounds that:

1. The constitutional questions sought to be reviewed were neither raised by Appellant, nor passed upon by the California Court of Appeal;

2. The decision of the California Court of Appeal was based solely upon the res judicata effect of a final judgment in California, an adequate state ground; or

3. State common law principles of real property and res judicata do not present a substantial federal question.

ARGUMENT

I.

THIS COURT HAS NO JURISDICTION TO DETERMINE FEDERAL QUESTIONS WHICH WERE NOT PRESENTED TO, OR DECIDED BY, THE STATE COURT.

This Court's appellate jurisdiction is invoked under 28 U.S.C. section 1257 (2) "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor its validity."

It is clear from the record, however, that Appellant neither raised the issue of the validity of the California unlawful detainer statute, either on its face or as applied, on the constitutional grounds alleged herein, nor did the California Court of Appeal pass upon any such issue.

Nowhere in the proceedings before the trial court or in his appeal to the Court of Appeal did Appellant claim or present the issue of the alleged unconstitutionality of the California unlawful detainer statute. This Court's jurisdiction must, therefore, fail since Appellant's claims of unconstitutionality were neither raised by him nor passed upon in the Court of Appeal. Cardinale v. Louisiana (1969) 394 US 437, 438, 89 S CT 1162, 22 L ed 2d 398.

Appellant complains that the California unlawful detainer statute prevented him raising his legal and

equitable claims and defenses in the unlawful detainer action, including his claims of unconstitutionality. From a review of the record and the Opinion of the Court of Appeal, however, it is clear that Appellant had a full and fair opportunity to present such claims and defenses, and extensively litigated them in the unlawful detainer action. See Court of Appeal's Statement of the Facts (Opinion, pps. 37 - 41), and its conclusions. Id. at pps. 56 and 60. Since no constitutional issues were raised by Appellant's prior attorney in the 1983 Municipal Court and Superior Court actions, nor by his present attorney in the trial court or Court of Appeal in this action, having had his claims rejected by these courts, it is apparent that Appellant has simply thought up a new claim of constitutional impairment, and now wishes to raise it before this Court.

Appellant contends that "the federal questions were properly and timely raised in the state's superior court action (seventh cause of action) and were necessarily reviewed and decided by the superior court to reach its judgment." Corrected Jurisdictional Statement, p. 14. The seventh cause of action, however, contains no allegations of constitutional impairment to the California unlawful detainer statute, and merely seeks state injunctive relief concerning Appellant's alleged right, title and interest in and to the apartment. In addition, the federal question must be raised and decided by the highest state court, here the Court of Appeal, and not the trial court. Lynch v. New York (1934) 293 US 52, 55 S CT 16, 79 L ed 191. The only questions raised by Appellant on appeal to the Court of Appeal were set forth by the

Court as follows: "1) the municipal court did not have subject matter jurisdiction in the unlawful detainer action; and 2) he [Appellant] is not subject to an unlawful detainer action in any court, as his interest in the apartment constitutes an interest in real property greater than a tenancy for less than life - the interest required to come within the realm of an unlawful detainer action. (Code Civ. Proc., section 1161.)" Opinion, p. 47.

Even if it is assumed, arguendo, that a claim for injunctive relief could somehow be deemed to include a claim that the California unlawful detainer statute is repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment, this Court would not have jurisdiction. The federal question, and the

grounds therefor, must be clearly brought to the attention of the highest state court:

> "Questions not raised below are those in which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, (citing authority), they should be given the first opportunity to consider them. Cardinale, supra at p. 439.

And see Lynch v. New York, supra at p. 54 ("...jurisdiction cannot be founded upon surmise....It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it

must appear affirmatively from the record ...."); and see Harding v. Illinois (1904) 196 US 78, 25 S CT 176, where this Court held that even where there are general allegations of unconstitutionality in the complaint, where no authorities are cited or arguments advanced in support of the claim that the state statute is unconstitutional, the Court may consider the federal grounds to have been waived by such conduct.

It is also clear that no federal question was decided by the Court of Appeal. It is essential to the jurisdiction of the Court in reviewing state court judgments, by appeal or writ of certiorari, that the federal question must be expressly decided by the highest state court:

> "...jurisdiction cannot be founded upon surmise. Nor can claim of jurisdiction be sustained by reference to briefs

> and statements which are not part of the record. It...must appear affirmably from the record, not only that the federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it (citing authority)." (emphasis added) Lynch v. New York, supra at p. 54.

The Court of Appeal specifically declined to rule on the merits of Appellant's claims, and merely held that claims raised by Appellant in this action were raised and litigated by Appellant in the 1983 unlawful detainer action, and, therefore, were barred by the state common law doctrine of res judicata. The Court of Appeal, therefore, did not base its decision on any federal ground:

> "It is clear from the opinion cited that the state court based its decision upon other than Federal grounds, and

did not decide the constitutional question sought to be made here." Harding v. Illinois, supra at p. 88.

Since the constitutional questions sought to be reviewed were not timely or properly raised, and were not expressly passed on by the Court of Appeal, this Court has no jurisdiction to review the state decision by appeal or certiorari.

II.

THIS COURT HAS NO JURISDICTION TO REVIEW A DECISION OF A STATE COURT BASED SOLELY UPON THE RES JUDICATA EFFECT OF A FINAL JUDGMENT IN THAT STATE.

This Court has no jurisdiction to review state court judgments if the non-federal ground is adequate to support the judgment. Herb v. Pitcairn, (1945) 324 US 117, 65 S CT 459, 89 L ed 789. In Herb the Court set forth the rationale for this well settled doctrine:

> "the reason is...found in the partitioning of power between the state and federal judicial system and in the limitations of our own jurisdiction. Our only power over state judgements is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." pps. 125 - 126.

It is clear from the Opinion of the Court of Appeal that its decision was not based upon a federal ground. Indeed, the Court of Appeal expressly declined to rule on the merits of Appellant's claims:

> "We...hold that the present action is barred to the extent that it raises claims and issues which were, or could have been, decided in the unlawful detainer action. In so holding we do not reach the merits of Nieves' claims." Opinion, p. 49.

The highest state court expressly disclaimed any constitutional question and, therefore, jurisdiction fails. Harding v. Illinois, supra at p. 88.

The Court of Appeal's decision was based wholly on the issue of res judicata, a state common law doctrine. Contrary to Appellant's assertion, res judicata is hardly a novel state procedure which unfairly surprises litigants, as it did in NAACP v. Alabama (1958) 357 US 449, 78 S CT 1163, 2 L ed 2d, 488. Under the full faith and credit statute (28 U.S.C. section 1738), a federal court must refer to the laws of the state in determining the preclusive effect of state judgments, rather than employ its own rules of res judicata. Marrese v. American Academy of Orthopaedic Surgeons (1985) 470 US 373, 105 S CT 1327, 84 L ed 2nd 274.

The decision of the Court of Appeal on the res judicata issue was based upon its extensive review and analysis of the res judicata effect of final judgments in California (See Opinion, pps. 49 - 57), particularly the California Supreme Court decision in Estate of Estrem (1940) 16 Cal. 2d 563, which holds that res judicata applies to a determination by a court of its own subject matter jurisdiction when the question was duly litigated with notice and participation of the parties affected by it. The Court of Appeal noted that the issue of the Court's jurisdiction was extensively litigated by the parties in the unlawful detainer action and determined that a collateral attack of its judgment was not warranted. Opinion, pps. 55 - 57. State courts are free to determine the jurisdiction of their own courts under state law, in a

non-discriminatory fashion, even if such a determination would result in a dismissal of a federal cause of action. See Herb v. Pitcairn, supra at pps. 120 - 124.

This Court has no jurisdiction, therefore, since the decision of the Court of Appeal rests upon an adequate state ground.

III.

STATE COMMON LAW PRINCIPLES OF REAL PROPERTY AND RES JUDICATA DO NOT RAISE A SUBSTANTIAL FEDERAL QUESTION.

Appellant acknowledges that the federal question must be substantial to afford the basis for review by this Court. Appellant, however, mistakenly equates a substantial federal question merely with the allegation of a violation

of the Constitution or federal law ("'substantial federal question' -- i.e., a purported violation of the Constitution, a federal statute or treaty." Corrected Jurisdictional Statement, p. 13.) It is well settled that even though the validity of a law is formally drawn into question, the Supreme Court will decline jurisdiction whenever it appears to the court that it is not substantial in character. Zucht v. King (1922) 260 US 174, 176, 43 S CT 24, 67 L ed 194.

Guidelines for review are set forth in Equitable Life Assurance Society v. Brown (1902) 187 US 308, 311, 23 S CT 123, 47 L ed 190:

> "[I]t is settled that not every mere allegation of a Federal question will suffice to give jurisdiction. 'There must be a real, substantive question on which the case may be made to turn,' that is, 'a real, and not a merely formal, Federal question is essential to the jurisdiction of this court.'

> Stated in another form, the doctrine thus declared is, that although, in considering a motion to dismiss, it be found that a question adequate, abstractly considered, to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no room for real controversy, the motion to dismiss will prevail." p. 311.

The alleged federal questions for which Appellant seeks review by this Court are set forth on page 14 of his Corrected Jurisdictional Statement: "1) the nature of the interest in the stock coop owned by Appellant, 2) the constitutionality of the summary proceeding to terminate and forfeit his interest, and 3) the right to bring a subsequent action for damages after the summary eviction proceeding."

1. The nature of the interest in the stock cooperative.

Appellant claims that the California unlawful detainer statute does not apply to him since:

> "...Appellant, owned under common law, an interest in excess of a term less than life. Under common law, Appellant owned a fee simple absolute subject to condition subsequent." Corrected Jurisdictional Statement, p. 13."

It is to state the obvious that there is no federal common law regarding real property, and the "Constitution has not federalized the substantive law of landlord-tenant relations..." Lindsey v. Normet (1972) 405 US 56, 68, 92 S CT 862, 31 L ed 2d 36. The nature of Appellant's property interest, and the applicability of a state remedy, is based solely upon state law.

Appellant mistakenly asserts that "Counsel for Appellee argued to the California Court of Appeals [sic] that federal law 'regulated' this [Appel-

lant's] interest and implied that Congress had somehow preempted real property law...." Corrected Jurisdictional Statement, p. 22. Appellee did not claim any such federal property law. In response to Appellant's claim that the requirement for him to assign any rental profit from a sublease with his alleged niece was an unreasonable restraint on alienation, Appellee pointed out to the Court of Appeal in its responding brief (at pps. 34 - 37) that the requirements set forth in the lease were required by the United States Department of Housing and Development, which insured the mortgage, and that a failure to enforce such provisions in the legal documents may be a breach of Appellee's Regulatory Agreement with HUD.

In any event, jurisdiction cannot be sustained by reference to briefs and statements not a part of the record

(Lynch v. New York, supra at p. 54), and the Court of Appeal expressly declined to rule on the merits of Appellant's real property claims.

2. The constitutionality of the unlawful detainer statute. This issue was not submitted to the trial court or Court of Appeal, nor did either court rule on this issue (see I., supra at p. 15).

In any event, this Court has reviewed and upheld the constitutionality of state summary remedies for possession of real property. See Lindsey v. Normet, supra:

> "This Court has recognized that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review (citing authority). Lindsey, supra at p. 77.

After reviewing the voluminous record in the 1983 unlawful detainer action, the Court of Appeal found that

Appellant was afforded a full and fair opportunity to, and did, in fact, extensively litigate his claims of title to the real property and the propriety of the municipal court's jurisdiction over such interest in the unlawful detainer action, and concluded that "Nieves has had his day in Court." See Court of Appeal Opinion at pps. 56 and 60.

3. The right to a subsequent action for damages. The Court of Appeal decision sought to be reviewed, merely held that all issues which had been litigated, or which could have been litigated, by Appellant in the prior unlawful detainer action could not be relitigated.

The full faith and credit statute (28 U.S.C. section 1738) requires a federal court to refer to the preclusive law of the state in which judgment was ren-

dered to determine the preclusive effect of a prior state judgment. Marrese v. American Academy of Orthopaedic Surgeons (1985) 470 US 373, 105 S CT 1327, 84 L ed 2d 274.

The Court of Appeal reviewed California law and correctly stated that although unlawful detainer judgments do not normally preclude subsequent actions regarding title because issues of title are not ordinarily addressed in summary proceedings: "However, the full and fair adjudication in an unlawful detainer action of issues material to a determination of title stands as a conclusive determination of those issues. This is so even when the action takes place in a municipal court (Vella v. Hudgins (1977) 20 Cal. 3d 251, 257." Opinion, p. 57. The Court of Appeal analyzed the California Supreme Court decision in

Vella concerning the res judicata issue, and noted that even if the value of the real property exceeded the monetary jurisdiction of a municipal court, its judgment would preclude relitigation of title issues to the extent that the unlawful detainer action afforded the litigants a full and fair opportunity to litigate such matters. After reviewing the record in the 1983 action, the Court of Appeal concluded that Appellant "was afforded a full and fair opportunity to litigate the issues material to a determination of title...in the unlawful detainer action...." Id. at pps. 57 - 60.

Contrary to Appellant's assertion, the Court of Appeal determined that the law in California is that a court has jurisdiction to determine its own subject matter jurisdiction:

> "...res judicata also applies to the determination by

> a court of its own subject matter jurisdiction. (Estate of Estrem (1940) 16 Cal. 2nd 563, 569)" Opinion, pps. 50 - 51.

In relying on the California Supreme Court decision in Estate of Estrem, supra, Perry v. Superior Court (1985) 174 Cal. App. 3d 1085, and in examining the Restatement Second of Judgments section 12, and Restatement Second of Conflict of Laws section 97, the Court of Appeal stated that:

> "...normal principles of res judicata apply to the determination of subject matter jurisdiction unless that policy is outweighed by the policy against allowing a court to act without jurisdiction." Id. at p. 53.

The Court of Appeal reviewed and considered the various "exceptions" or factors listed by these authorities (Id. at pps. 55 - 56), and concluded that a collateral attack of the 1983 unlawful detainer judgment was not justified:

> "...we note that the issue of the court's jurisdiction was extensively litigated in the municipal court action. We find that this consideration far outweighs the others as it goes to the heart of the policy underlying the doctrine of res judicata." Id. at pps. 56 - 57.

The preclusive law of California is in conformity with rulings of this Court. See Chico County Drainage District v. Baxter State Bank (1940) 308 US 371, 60 S CT 317, 84 L ed 329, and authorities cited therein:

> "The Court has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, while open to direct review, is res judicata in a collateral action." Chico County Drainage District, supra at p. 377.

There is, therefore, no substantial federal question in light of prior Supreme Court decisions. Palmer Oil Corp. v. Amerada Petroleum Corp. (1952) 343 US 390, 72 S CT 842, 96 L ed 1022.

Appellant claims that he has been denied an opportunity in the state courts to present his claims concerning the nature of his property rights and the propriety of the 1983 unlawful detainer judgment. After reviewing the extensive record on appeal, however, the Court of Appeal determined that Appellant had fully litigated all his claims in the prior action. It is apparent that Appellant is merely unhappy with the determinations made by the municipal and superior courts in the prior actions. Appellant does not accept the fact that all litigation must, at some time, come to an end.

The Court of Appeal noted that "the doctrine of res judicata 'rests upon the sound policy of limiting litigation by preventing a party who has had one fair adversary hearing on an issue from again drawing it into controversy and subject-

ing the other party to further expense in its reexamination.' (In re Crow (1971) 4 Cal. 3d 613, 622 - 623.)" Opinion, pps. 49 - 50, and concluded:

> "Unlike the court in Vella, we have no difficulty in finding that Nieves was afforded a full and fair opportunity to litigate the issues material to a determination of title. Nieves' claims to ownership in the present case are exactly the same arguments he proposed in the unlawful detainer action to deny the existance of a landlord -tenant relationship. In fact, Nieves went to great lengths in the unlawful detainer action to establish the existence of his equitable interest in the apartment. (See Nieves' Supplemental Trial Brief.) Nieves has had his day in court." Id. at p. 60. (emphasis added)

It is clear that Appellant's claims that he has been denied due process and equal protection under the laws are without merit and do not present any substantial federal question.

CONCLUSION

For the foregoing reasons, Appellee respectfully submits that Appellant's appeal should be dismissed, and no writ of certiorari should be granted.

December 16, 1988

Respectfully submitted,

Allan M. Berland

Attorney for Appellee,
Marina Gardens No. 1, Inc.

CERTIFICATE AND DECLARATION

RE

PROOF OF SERVICE BY MAIL

I, Allan M. Berland do hereby declare that I have been advised by the Clerk of this Court that I will be admitted to the Bar of the Supreme Court of the United States on January 9, 1989; that I represent Appellee, Marina Gardens No. 1, Inc., in the within matter; and that all parties required to be served with the Motion of Appellee To Dismiss have been served as follows:

On December 16, 1988, I served the Motion of Appellee To Dismiss on all parties required to be served by placing, on that date, a true copy thereof enclosed in a sealed envelope, and deposited in the United States Postal Service, San Francisco, California, with first class postage prepaid, addressed as follows:

1. One copy in an envelope addressed:

Clerk, California Supreme Court
State Building Room 4250
San Francisco, CA 94102

2. One copy in an envelope addressed:

Clerk, Court of Appeal
5154 State Building
350 McAllister Street
San Francisco, CA 94102

3. One copy in an envelope addressed:

Clerk, Superior Court of San Mateo County
401 Marshall Street
Redwood City, CA 94063

4. One copy in an envelope addressed:

M. Dean Sutton, Esq.
Attorney for Appellant, Reuben Nieves
Fulton Law Firm
1833 The Alameda
San Jose, CA 95126

5. One copy in an envelope addressed:

Hon. John Van de Kamp
California Attorney General
1515 "K" Street
Sacramento, CA 95814

I declare under penalty of perjury that the foregoing is true and correct, and that this Certificate and Declaration

was executed on December 16, 1988, at San Francisco, California.

Allan M. Berland

State of California)
County of San Francisco) ss.

On this 16th day of December in the year one thousand nine hundred and eighty-eight, before me, the undersigned Notary Public, State of California, duly commissioned and sworn, personally appeared ALLAN M. BERLAND, known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in the County of San Francisco the day and year in this acknowledgment first above written.

C. Salas

NOTARY PUBLIC, State of California

OFFICIAL SEAL
C. SALAS
Notary Public-California
SAN FRANCISCO COUNTY
My Comm. Exp. Oct. 16, 1990